

BAGLY, *et al.*,  
Plaintiffs,  
v.  
UNITED STATES DEPARTMENT  
OF HEALTH AND HUMAN SERVICES;  
XAVIER BECERRA, in his official  
capacity as Secretary of the U.S.  
Department of Health and Human Services;  
ROBINSUE FROHBOESE, in her official  
capacity as Acting Director, Office for Civil  
Rights, U.S. Department of Health and  
Human Services; and  
LIZ RICHTER, in her official capacity as  
Acting Administrator for the Centers for  
Medicare and Medicaid Services, U.S.  
Department of Health and Human Services;  
Defendants.

Defendants United States Department of Health and Human Services (“HHS”); Xavier Becerra, in his official capacity as Secretary of the U.S. Department of Health and Human Services;<sup>1</sup> Robinsue Frohboese, in her official capacity as Acting Director, Office for Civil Rights, U.S. Department of Health and Human Services; and Liz Richter, in her official capacity as Acting Administrator for the Centers for Medicare and Medicaid Services, U.S. Department of Health and

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Human Services; by and through undersigned counsel, respectfully submit this Status Report to inform the Court of interim developments arising from ongoing agency proceedings.

### **Determination that HHS Anticipates Initiating a Section 1557 Rulemaking Proceeding**

As previously addressed, new leadership began arriving at HHS and the U.S. Department of Justice on January 20, 2021, and this new leadership will be reassessing the issues that this case presents. Defendant Secretary Becerra took office less than two months ago, on March 19, 2021. And HHS continues to await a permanent director of the HHS Office for Civil Rights. Nevertheless, HHS has determined that it intends to initiate a rulemaking proceeding on Section 1557 of the Affordable Care Act. Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities, and a final rule on Section 1557 is the subject of the Plaintiffs' Administrative Procedure Act claims in this case. The anticipated rulemaking proceeding will provide for the reconsideration of many or all of the changes to existing Section 1557 regulations that Plaintiffs challenge here. HHS anticipates issuing a Notice of Proposed Rulemaking as expeditiously as reasonably possible. An anticipated timeframe for issuing a Notice of Proposed Rulemaking must account for HHS's limited resources, including the heavy costs in terms of valuable time and effort expended on litigation that might otherwise be directed to the proper implementation of the anticipated rulemaking.

### **May 10, 2021 Notice of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972**

On May 10, 2021, HHS issued a notification to inform the public that, consistent with the Supreme Court's decision in *Bostock* and Title IX, HHS will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination on the

basis of sexual orientation; and (2) discrimination on the basis of gender identity. A copy of the notice is attached and it will be published in the Federal Register.

Dated: May 10, 2021

Respectfully submitted,

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/s/ Liam C. Holland  
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